



BILLING CODE: 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 190409351-9512-02]

RIN 0648-XG972

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement annual management measures and catch limits for the northern subpopulation of Pacific sardine for the fishing year from July 1, 2019, through June 30, 2020. This action prohibits directed commercial fishing for Pacific sardine off the U.S. Pacific Coast, except in the live bait or minor directed fisheries, or as part of exempted fishing permit activities, and establishes limits on the incidental harvest of Pacific sardine in other fisheries. This action is intended to conserve and manage the Pacific sardine stock off the U.S. West Coast.

DATES: Effective July 1, 2019, through June 30, 2020.

FOR FURTHER INFORMATION CONTACT: Lynn Massey, West Coast Region, NMFS, (562) 436-2462, lynn.massey@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific Coast (California, Oregon, and

Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The FMP and its implementing regulations require NMFS to set annual catch levels for the Pacific sardine fishery based on the annual specification framework and control rules in the FMP. These control rules include the harvest guideline (HG) control rule, which, in conjunction with the overfishing limit (OFL) and acceptable biological catch (ABC) rules in the FMP, are used to manage harvest levels for Pacific sardine, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*

This final rule implements the annual catch levels and reference points for the 2019-2020 fishing year. The final rule adopts, without changes, the catch levels and restrictions that NMFS proposed in the rule published on May 28, 2019 (84 FR 24459), including the OFL and ABC that take into consideration uncertainty surrounding the current estimate of biomass for Pacific sardine in the U.S. EEZ off the U.S. Pacific Coast. The proposed rule for this action included additional background on specifications and the details of how the Pacific Fishery Management Council (Council) derived its recommended specifications for Pacific sardine. Those details are not repeated here. For additional information, please refer to the proposed rule for this action.

Table 1 -- Reference Points for the 2019-2020 sardine fishing year in metric tons (mt).

Biomass Estimate	OFL	ABC	HG	ACL	ACT
27,547	5,816	4,514	0	4,514	4,000

This final rule implements an OFL of 5,816 mt, an ABC and ACL of 4,514 mt, and allows Pacific sardine catch only for live bait, in a minor directed fishery, as incidental catch in other fisheries, or under an exempted fishing permit (EFP).

Additionally, this rule implements an annual catch target (ACT) of 4,000 mt, as well as restrictions on the incidental catch of Pacific sardine by other fisheries and a trip limit that could be imposed on directed fishing for sardine as live bait.

For the first time, the estimated biomass for Pacific sardine has fallen below the 50,000-mt minimum stock size threshold (MSST) defined in the CPS FMP, which requires NMFS to initiate a process to declare the Pacific sardine stock overfished. Although NMFS has not officially determined the stock to be overfished, the Council made recommendations for the 2019-2020 Pacific sardine harvest specifications in anticipation of NMFS making such a determination in the near future. The CPS FMP previously required that when a CPS stock is overfished, live bait landings of that stock be restricted to only incidental catch up to 15 percent of total CPS on board. However, on June 10, 2019, NMFS approved Amendment 17 to the CPS FMP, which removed this pre-specified limit on fishing for live bait of a CPS stock that is overfished. Because Amendment 17 was still under Secretarial review at the April 2019 Council meeting, the Council recommended management measures for the 2019-2020 sardine fishing year that matched the status quo FMP provisions (*i.e.*, no directed live bait for overfished stocks and 15 percent maximum incidental limit on live bait for overfished stocks) but also stated its desire to use the provision of Amendment 17 (*i.e.*, allow directed live bait for overfished stocks with no predetermined limits) if it is approved. Because NMFS approved Amendment 17, directed live bait fishing for sardine will be permitted for the 2019-2020 fishing year per the Council's recommendation.

The final specifications include the following management measures and inseason accountability measures for commercial sardine harvest during the 2019-2020 fishing year:

- 1) Directed live bait fishing is allowed, subject to the accountability measure specified under number 2 below.
- 2) If landings by the live bait fishery reach 2,500 mt, NMFS will impose a 1-mt trip limit on retention of sardine in the live bait fishery.
- 3) A 20-percent incidental per landing by weight catch allowance will be applied to other CPS primary directed commercial fisheries (*e.g.*, Pacific mackerel).
- 4) A 2-mt per trip incidental catch allowance will apply to non-CPS fisheries.
- 5) If the ACT of 4,000 mt is harvested by all fishing sectors combined, NMFS will impose a 1-mt trip limit on sardine caught as live bait, and a 1-mt trip limit on incidentally-caught sardine when caught while targeting other CPS.

All sources of catch, including any EFP set-asides, the live bait fishery, and other minimal sources of harvest, such as incidental catch in CPS and non-CPS fisheries, and minor directed fishing, will be counted against the ACL.

The NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** to announce when catch reaches the incidental limits as well as any changes to allowable incidental catch percentages. Additionally, to ensure that the regulated community is informed of any closure, NMFS will make announcements through other means, including emails to fishermen, processors, and state fishery management agencies.

As explained in the proposed rule, the Quinault Indian Nation did not request a tribal set-aside for the 2019-2020 fishing year and therefore no set-aside was established and none is accounted for under the ACL.

At the April 2019 meeting, the Council also voted in support of two EFP proposals that would exempt the permit holders from the prohibition on direct harvest of Pacific sardine. The ACT and ACL were formulated with the assumption that up to 405 mt of Pacific sardine would be harvested under these two EFPs.

On May 28, 2019, NMFS published a proposed rule for this action and solicited public comments (84 FR 24459) through June 12, 2018. NMFS received two public comment letters - one from the CPS industry group California Wetfish Producers Association (CWPA), and one from the environmental advocacy organization Oceana. Both comment letters included multiple comments, including some comments that were beyond the scope of this rulemaking. After considering both public comments, no changes were made from the proposed rule. NMFS summarizes and responds to the comment letters below.

Comments and Responses

Comment 1: The CWPA stated that it disagrees with the determination made for this rule by the Chief Counsel for Regulation of the Department of Commerce under the Regulatory Flexibility Act (RFA), 5 U.S.C. §601 et seq., which concluded that the 2019-2020 proposed harvest specifications and management measures would not have a significant economic impact on a substantial number of small entities. The commenter's primary objection to the determination is that the proposed action would significantly reduce profit for a substantial number of small entities, and specifically that the proposed

20-percent incidental landing allowance of Pacific sardine in other CPS directed fisheries would have a significant impact on the affected entities.

Response: As stated in the proposed rule, the annual HG is the main tool used to manage the principal commercial sardine fishery and is the harvest level NMFS typically uses for profitability analysis. For the purposes of profitability analysis, this final rule implements an HG of zero for the 2019-2020 Pacific sardine fishing season (July 1, 2019, through June 30, 2020). Likewise, the HG for the previous 3 fishing years was also set at zero, thereby prohibiting the primary commercial directed Pacific sardine fishery. Therefore, NMFS determined that this rule will not change the potential profitability compared to recent fishing years for the primary commercial fishery for Pacific sardine.

In addition to the primary commercial fishery, NMFS recognized that this action also affects other fisheries for Pacific sardine such as live bait and minor directed fisheries, as well as other CPS fisheries that incidentally catch Pacific sardine. NMFS also determined that the proposed action will not significantly reduce the profitability of those fisheries compared to previous years. Specifically, the various directed and incidental catch allowances, such as the maximum allowed incidental catch rate of 20 percent, and other inseason management measures in this rule, are intended to not only help prevent overfishing but also ensure, to the extent practicable, maximum access to Pacific sardine throughout the fishing year for these other fishery sectors.

Regarding the commenter's objection to setting the incidental landing allowance at 20 percent, NMFS notes that the FMP requires that the incidental catch allowance for an overfished CPS stock be set between 0 and 20 percent of the landed weight of the target stock. Therefore, the incidental catch allowances for other CPS fisheries cannot be

higher than 20 percent. According to the CPS FMP, Pacific sardine is in an overfished condition when its biomass is below 50,000 mt. The 2019 Pacific sardine stock assessment, which has been determined to be the best scientific information available for setting the 2019-2020 harvest specifications, shows that Pacific sardine biomass is below this level. Although NMFS has not officially determined the stock to be overfished, the Council recognized that NMFS would likely declare the stock overfished in the upcoming several months, and accordingly recommended an incidental allowance limit within this 0 to 20 percent range during the April meeting when the Council makes decisions about annual Pacific sardine specifications for the season that starts the following July. The only alternative to the 20-percent incidental allowance would have been a lower incidental allowance. For this reason, implementing a 20-percent incidental allowance has the lowest possible economic impact on small entities permitted under the CPS FMP.

Fishery information from recent years suggests that a 20-percent incidental landing limit will not unnecessarily constrain other CPS fisheries that encounter Pacific sardine. In the previous years when the commercial directed Pacific sardine fishery was closed, the maximum incidental harvest limit of Pacific sardine in other CPS fisheries was set initially at 40 percent, and then set to be reduced when the year's cumulative landings hit a certain level. For example, for the 2018-2019 Pacific sardine fishing year, incidental harvest allocation for Pacific sardine in other CPS fisheries was set at 40 percent by weight until 2,500 mt were caught, after which the limit would be reduced to 20 percent. Similarly for the 2017-2018 fishing year, 40 percent incidental sardine harvest was allowed until 2,000 mt were caught, after which it would have been reduced to 20 percent. The 2017-2018 fishing year also had a provision to further reduce

incidental sardine harvest to 10 percent if total catch reached 5,000 mt. NMFS considered the reduction in the Pacific sardine incidental allowances for the 2019-2020 fishing year and potential impact for CPS fisheries that incidentally catch this stock in the RFA determination for this action. During the 2017-2018 and 2018-2019 fishing years, while operating with a 40-percent incidental trip limit, the other CPS fisheries only incidentally caught 275 mt and 174 mt (as of April 1, 2019) of Pacific sardine, respectively. Over this same time period of the 2018-2019 Pacific sardine fishing year, the commercial anchovy fishery off of California caught approximately 11,000 mt of anchovy, leading to one of the highest annual anchovy landing levels in California in recent history. These numbers demonstrate that the anchovy fishery did not need to regularly utilize a high percentage mix of Pacific sardine when harvesting anchovy.

Although the commenter presents landings data that they state demonstrates that a lower incidental limit will constrain other CPS fisheries, based on the information above, it appears that when this data is put in the larger context of all landings per species, not just landings that had incidental catch, a 20 percent incidental may not be as restrictive as looks based on that data. For example, the commenter references data showing that four anchovy landings during the current 2018-2019 Pacific sardine fishing season had incidental Pacific sardine in amounts higher than 20 percent. However, this is only 4 out of 406 landings made by CPS fishermen targeting anchovy that had any incidental Pacific sardine landings greater than 20 percent. Similarly, for the Pacific mackerel fishery, only 1 landing in the 2017-2018 fishing year, and none of the 177 Pacific mackerel landings in the 2018-2019 fishing year had any Pacific sardine landings that exceeded than 20 percent. Therefore based on recent fishing practices, and recent utilization allowances for

incidental Pacific sardine landings, NMFS determined that this action would not significantly affect profitability. NMFS recognizes that CPS-species mixing rates can change and fishing conditions are dynamic. To accommodate the dynamic nature of the CPS fisheries, NMFS has supported Council recommendations over the last few years that have allowed access to the applicable Pacific sardine ACLs by other CPS fisheries that have available quota, including the maximum 40-percent incidental harvest limit during the last 2 years and the maximum 20-percent incidental harvest limit this year.

Comment 2: The CWPA stated that NMFS did not adequately consider the potential for significant environmental effects, including socioeconomic effects, from the proposed action, and should have conducted an environmental assessment (EA) under the National Environmental Policy Act.

Response: NMFS considered whether this action triggered any extraordinary circumstances that may require analysis in an EA or environmental impact statement (EIS). NMFS did not find that any extraordinary circumstances were triggered. In addition, NMFS determined that there were no significant adverse economic impacts caused by this action. Additionally, NMFS determined that this rule does not demonstrate any potential for adverse impacts to the marine environment because the level of allowable fishing has been analyzed within the scope of impacts considered in the EIS prepared for the original FMP and the EA prepared for Amendment 13 to the FMP. Lastly, this rule prohibits the primary commercial fishery from harvesting Pacific sardine during the upcoming fishing year to protect the Pacific sardine resource, thereby negating the potential for any significant impacts on any target or non-target species or other marine resources.

Comment 3: The CWPA comment letter stated that NMFS should disapprove this action because it is not based on the best scientific information available. The commenter's primary rationale for this is that the Pacific sardine stock assessment is inaccurate and that Pacific sardine biomass is higher than the estimate from the most recent stock assessment.

Response: NMFS determined that this action is based on the best scientific information available. This includes the 2019 Pacific sardine stock assessment, which the Council's SSC and NMFS reviewed and approved as the best scientific information available for setting Pacific sardine harvest specifications. NMFS did not identify inaccuracies in the 2019 Pacific sardine assessment. NMFS recognizes that during various reviews of the Pacific sardine assessment, the assessors and reviewers explored uncertainty in the data used in the model and the technical methods used to analyze the data (e.g. selectivity patterns for the survey data, use of different age and length composition data, recruitment). However, the uncertainty in the data or the technical methods was not substantial enough to invalidate the determination that the assessment represents the best scientific information available for setting Pacific sardine harvest specifications.

NMFS is continually working to improve methods to estimate Pacific sardine biomass. In recent years, the commenter and other CPS industry members have stated that the Pacific sardine abundance they observe at sea is inconsistent with the results of the Pacific sardine assessment. To that end, the harvest specifications in this action were set to allow up to 405 mt of Pacific sardine to be harvested under two EFPs supporting industry-run research on Pacific sardine and other CPS. These EFPs will allow

participants to assess CPS abundance in inshore areas that are too shallow for NOAA vessels to survey. NMFS is currently finalizing review and approval for this important research.

Comment 4: Oceana supported the prohibition on primary directed fishing for Pacific sardine and the reduction in the incidental catch allowance of Pacific sardine in other CPS fisheries from 40 percent to 20 percent. In addition to commenting on the proposed rule, Oceana's comment (and previous public comments by Oceana referenced in its letter) requested reconsideration of various aspects of Pacific sardine management that are not within the scope of this action. The recommendations in the comment letter include changing the start date of the fishery, revising the MSST value, and modifying various parameters in the OFL, ABC, and HG control rules. Oceana also commented on NMFS' timeline on declaring the Pacific sardine stock overfished and requested that NMFS declare that overfishing occurred on Pacific sardine in past years based on exploitation rates presented in the 2019 Pacific sardine stock assessment, specifically that overfishing occurred in 2017 and 2018 based on the combined U.S. and Mexico exploitation rate, which are also actions outside the scope of this rule.

Response: NMFS agrees with the commenter regarding the prohibition on primary directed fishing and the 20-percent incidental landing limit for Pacific sardine. Changes to the management framework of Pacific sardine and to the Pacific sardine harvest control rules are set in the CPS FMP and are beyond the scope of this rulemaking. NMFS notes that some of these changes, such as to the value for Distribution in the Pacific sardine harvest control rules and the MSST, have been previously reviewed during specific agenda items at Council meetings. However, NMFS

will communicate other concerns to the PFMC for their consideration during related future management planning for the Pacific sardine stock.

Regarding the change in stock status for Pacific sardine, NMFS is still in the process of making a formal declaration on a change to the stock status of Pacific sardine to overfished, however we still expect to submit a letter to the Council regarding a change in the status of the Pacific sardine stock in the coming months.

As it relates to the comment that overfishing has occurred, it appears the commenter is confused with regard to how overfishing is determined for Pacific sardine, how ABC is calculated, and the differences between rate/fishing mortality based overfishing criteria and total catch based criteria. As stated in the preamble of the proposed rule and this final rule, Pacific sardine uses a total catch-based method to determine whether overfishing is occurring. That is why the OFL is set annually in the harvest specifications. Pacific sardine harvest specifications do not set a fishing *mortality level* or *rate* as the indicator for whether overfishing will occur. Although NMFS' Magnuson-Stevens Act National Standard 1 guidelines at 50 CFR part 600 Subpart D provide the option of defining "overfishing status" by using *either* a fishing mortality rate measured against a maximum fishing mortality threshold or catch in terms of numbers or weight of fish measured against an OFL, the CPS FMP defines overfishing for Pacific sardine by establishing an OFL annually. Overfishing would occur for Pacific sardine if total United States catch exceeded the OFL. As noted by the commenter this has never happened. Therefore overfishing has never occurred in this fishery.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness of these final harvest specifications for the 2019-2020 Pacific sardine fishing season. In accordance with the FMP, this rule was recommended by the Council at its meeting in April 2019. The contents of this rule were based on the best available information on the population status of Pacific sardine at that time. Making these final specifications effective on July 1, the first day of the fishing season, is necessary for the conservation and management of the Pacific sardine resource because last year's restrictions on harvest are not effective after June 30. The FMP requires a prohibition on directed fishing for Pacific sardine for the 2019-2020 fishing year because the sardine biomass has dropped below the 150,000-mt threshold for a primary directed commercial fishery. The purpose of this threshold in the FMP, and for prohibiting directed fishing when the biomass drops below this level, is to protect the stock when biomass is low and provide a buffer of spawning stock that is protected from fishing and can contribute to rebuilding the stock. A delay in the effectiveness of this rule for a full 30 days would result in the re-opening the directed commercial fishery on July 1.

Delaying the effective date of this rule beyond July 1 would be contrary to the public interest because it would jeopardize the sustainability of the Pacific sardine stock. Furthermore, most affected fishermen are aware that the Council recommended that directed commercial fishing be prohibited for the 2019-2020 fishing year and are fully prepared to comply with the prohibition.

This final rule is exempt from the procedures of E.O. 12866 because this action is an annual fishery management specification under the Magnuson-Stevens Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS received a comment regarding this certification that is summarized above in the preamble of the final rule. This comment did not cause NMFS to change its determination regarding the certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Pursuant to Executive Order 13175, this final rule was developed after meaningful consultation and collaboration with the tribal representative on the Council who has agreed with the provisions that apply to tribal vessels.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: June 25, 2019.

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Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

[FR Doc. 2019-13960 Filed: 6/28/2019 8:45 am; Publication Date: 7/1/2019]